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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1916

Delilah B. Blanks,

Petitioner,

v.

Wilbur Register, Chairman of the Bladen County Social Services Board, and Grady Peterson, George Resseguie, Michael R. Simmons, and Carl Suggs, Members of the Bladen County Social Services Board,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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The petitioner, Delilah B. Blanks, prays that a writ of certiorari issue to review the judgment made by the United States Court of Appeals for the Fourth Circuit, entered March 26, 1974, affirming the judgment of the United States District Court for the Eastern District of North Carolina, and dismissing petitioner's complaint.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit,

and the United States District Court for the Eastern District of North Carolina, in this case are not yet reported. Copies of these opinions are appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction of the District Court was based on 42 U.S.C. 1983 and 28 U.S.C. 1343(3), (4).

QUESTION PRESENTED

Where a position of public employment is held open for an extraordinarily long period of time, while a Negro's application is pending and has not been acted upon, and the applicant believes that the position is being withheld on account of race and sex, is an action brought to enforce the applicant's rights to the position premature and not ripe for adjudication?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1983

If a person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Plaintiff in her complaint sought an injunction mandating her appointment to the position of Director of Social Services of Bladen County.

Plaintiff had worked full time with the Bladen County Department of Social Services for approximately four years to July, 1971, when the Department granted her a year's leave of absence to allow her to secure a Master's degree in social work. As of March 1, 1972, the Director of Social Services of Bladen County resigned. Plaintiff promptly applied for this position. She was highly qualified for the job, having attained a State Department of Social Services rating of 80.00 as a "County Director, Social Services I," and possessing a Master's degree in social services with a superior academic average, together with substantial practical experience. There is no suggestion in the record that plaintiff is in any way unqualified to fill the position of Director of Social Services.

Instead of hiring plaintiff as Director, defendants made a temporary appointment of another individual as acting director. The acting director

did not possess the necessary qualifications and could not be appointed as Director.

Plaintiff is a Negro and a female. The acting director was a white female, and was a niece of one of the defendant members of the Bladen County Social Services Board. Defendants did extensive advertising in various newspapers, and engaged in personal solicitation at various locations outside North Carolina, seeking a new Director of Social Services. At some time in April or May, 1972, defendants tentatively offered the directorship to a Mr. Davis, a white male, but he could not pass the state tests necessary for the appointment. Defendants interviewed and considered for employment as permanent Director several other white males, but these individuals either did not desire the position or were not qualified for it.

This action was dismissed on May 11, 1973. On May 14, 1973, defendants voted to employ Charles Prince, a white male, as permanent Director of Social Services. Mr. Prince accepted and is presently serving in this position.

Following the order of dismissal, and upon learning of the employment arrangement made by defendants with Mr. Prince, plaintiff moved the District Court for injunction pending appeal for the restraint of defendants from entering into a formal and complete employment relationship with the new Director. The Court denied this motion by order entered

June 1, 1973.

The District Court's explanation of the decision to dismiss this action was:

> In demanding that she be appointed as Director of Social Services, plaintiff seeks to become defendants' chief executive officer--the person through whom defendants must implement their policies and discharge their statutory duties. To say that they must appoint the first Negro to apply for this position, although professionally qualified, or risk a suit for damages such as this one strikes the Court as a reductio ad absurdum in civil rights litigation. (Infra, p. 30).

The District Court stated that its dismissal of the action amounted to a summary judgment for defendants, citing Rule 12(b) of the Federal Rules of Civil Procedure. A review of the record indicates that the Court did not comply with the provision of Rule 12(b) that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56," because the Court's discussion with counsel at oral argument regarding summary judgment disposition, was limited to the issue of whether plaintiff had exhausted her administrative remedies with the Equal Employment Opportunity Commission, pursuant to 42 U.S.C. 2000e-5. (Transcript of Motion Hearing, pp. 17-18).

The Court of Appeals clearly was in error when it stated that the District Court had indicated that the motion under Rule 12(b) would be treated as one for summary judgment. (Infra, pp. 21, 22-23). Accordingly, the Court of Appeals was wrong in refusing to consider plaintiff's affidavits filed in that Court, for the purpose of showing the evidence that plaintiff could have offered on a summary judgment hearing reaching the merits of the case, if she had been given that opportunity. This evidence included a reported statement concerning plaintiff's application by defendant Wilbur Register that, "I don't think the County is ready for a Negro to head up a major agency;" and that defendants, while plaintiff's application was pending, had tentatively offered the position to a white male who could not pass the required state tests; that several other white males were considered for the position by defendants, but these individuals either did not want it or were not qualified for it; and that a white male was appointed to the position on May 14, 1973, three days after the District Court's judgment of dismissal, with whom there had been considerable communication over the preceding several months.

The Court of Appeals affirmed the District Court's decision on the theory that plaintiff's action was premature, in that another person had not been chosen to fill the permanent position before the date on which she

filed her action in court. (Infra, pp. 24-25).

ARGUMENT

AN ACTION BROUGHT TO ENFORCE THE APPLICANT'S RIGHTS TO THE POSITION IS MATURE AND RIPE FOR ADJUDICATION WHEN A POSITION OF PUBLIC EMPLOYMENT IS HELD OPEN FOR AN EXTRAORDINARILY LONG PERIOD OF TIME, WHILE A NEGRO'S APPLICATION IS PENDING AND HAS NOT BEEN ACTED UPON, AND THE APPLICANT BELIEVES THAT THE POSITION IS BEING WITHHELD ON ACCOUNT OF RACE AND SEX.

Plaintiff, eminently qualified for the position, applied to be Director of Social Services of Bladen County promptly after this position became vacant on March 1, 1972. No action was taken on plaintiff's application for more than 14 months. Instead of hiring plaintiff, who is a Negro, to be the Director, the Board made a temporary appointment of a white female, a niece of one of its members, as acting director. The acting director did not possess the necessary qualifications and could not be made permanent. While plaintiff's application was pending, defendants advertised and solicited far and wide to find a permanent Director. They made a tentative offer sometime during April or May, 1972, to a white male, but he could not pass the necessary state tests. They interviewed and considered for the position several other white males, but these individuals either did not desire the position or

were not qualified for it. Three days after the District Court dismissed this action, another white male was given the appointment.

This action was commenced on November 14, 1972, after plaintiff's application had been pending with the Social Services Board for eight months. Defendants in their motion and brief in District Court, as late as March 20, 1973, represented that they were still considering plaintiff's application.

The Court of Appeals accepted these representations as proven, and as binding on the Court. The Court of Appeals, accordingly, was of the opinion that plaintiff's action was premature and not ripe for adjudication.

This decision by the Court of Appeals is in conflict with the applicable decisions of this Court. Adickes v. Kress & Co., 398 U.S. 144 (1970), makes it clear that summary judgment for defendants was improper in the present case. That case also was an action under 42 U.S.C. 1983; there Adickes alleged that Kress & Company employees conspired with city policemen to deprive plaintiff of her right to enjoy equal service in a place of public accommodation. By deposition and affidavits, store personnel and policemen had denied any conspiracy. Adickes in her deposition said she had no knowledge of conspiratorial communications. All Adickes was able to show to support her conspiracy theory was that there was a policeman in the store

at the time of the refusal to serve her and that this officer subsequently arrested her. The Court held that Kress & Company had not carried its burden on the motion for summary judgment, because of its failure to foreclose the possibility that there was a policeman in the store who reached an understanding with some employee that Adickes not be served. 398 U.S. at 157.

Likewise, in the present case, defendants were not entitled to summary judgment because they did not foreclose the possibility that they were not considering plaintiff's application in good faith and free from racial prejudice. The facts before the District Judge, even at the time of the unanticipated summary judgment decision, indicate that defendants' inaction on plaintiff's employment application was on account of her race. A white female, unqualified for the directorship, was appointed temporary acting director. The acting directorship was not offered to plaintiff, who was fully qualified for the permanent position. The eight months of inaction on the application before plaintiff filed her lawsuit, in and of itself, was strong evidence that defendants were not giving an honest consideration to plaintiff's application. If there had been some reason why defendants did not want to employ plaintiff other than race, defendants surely would have rejected her application in timely fashion. There is an inescapable inference that by

dragging their feet defendants hoped plaintiff would seek other employment, and that they would be faced neither with a discrimination charge or an unwanted Negro employee.

In any event, it was erroneous on procedural grounds to grant summary judgment in this case. Rule 12(b) requires that when a motion to dismiss is treated as one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The District Court's invitation to treat the motion for dismissal as one for summary judgment, clearly extended only to defendants' contention that there had been a failure to exhaust remedies before the Equal Employment Opportunity Commission, so that a cause of action under 42 U.S.C. 2000e was not stated. There was no intimation by the Court that the cause of action under 42 U.S.C. 1983 would be subjected to summary judgment treatment. The Court of Appeals plainly read the record wrong in holding otherwise.

Regarding defendants' motion properly as one made under Rule 12(b)(6), it is abundantly clear that the case should not have been dismissed. Plaintiff alleged in her complaint that defendants' refusal to appoint her as Director of Social Services amounted to the failure and refusal to hire an individual because of her race, color, and sex. Such allegations cannot be

dismissed for failure to state a cause of action. Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969); Hailes v. United Airlines, 464 F.2d 1006 (5th Cir. 1972). Plaintiff supplemented the record when before the Court of Appeals, for the purpose of showing, not only that facts conceivably could be offered in evidence to support the claim, but that there were specific facts in this case available to plaintiff that would have been made a part of the record if the District Court had given fair warning that the matter was to be considered on summary judgment. For this purpose, plaintiff showed that during April or May, 1972, the directorship was tentatively offered to a white male, who could not pass the necessary state tests; that defendants interviewed and considered for the position several other white males, but these individuals either did not desire the position or were not qualified for it; that defendants advertised and solicited extensively in several states searching for a new Director of Social Services; that Charles Prince was appointed to the position on May 14, 1973, three days after the District Court's judgment of dismissal, and that defendants had been in previous contact with Mr. Prince for a considerable period of time; and that defendant Wilbur Register had said in reference to plaintiff's application, "I don't think the County is ready for a Negro to head up a major agency,"--all while plaintiff's applica-

tion for the job was pending and not acted upon. For the purpose of determining the ripeness of this case for adjudication, these matters presented to the appellate court ought to be taken into account. DeFunis v. Odegaard, 42 U.S.L.W. 4578 (1974).

Regardless of whether the record is viewed as a summary judgment case, which the Court of Appeals did, or as one involving a dismissal for failure to state a claim, the decision below should be reversed, and plaintiff given her day in court. The basic question in either case is whether a Negro applicant for public employment possesses a mature and justiciable claim, when the application goes ignored for many months and the position remains temporarily filled by an unqualified Caucasian. If the federal civil rights laws are to have any efficacy, this question must be answered affirmatively.

While this action is based on 42 U.S.C. 1983, a court in applying that section should look to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, for guidance as to constitutional constraints on public employers charged with racial discrimination. Davis v. Washington, 352 F.Supp. 187 (D.C. D.C. 1972); House Report No. 92-238, 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 2137, 2154 (1972). It is unlawful discrimination for an employer "to fail . . . to hire . . . any individual . . . because of such

individual's race, color, . . . sex, . . ." 42 U.S.C. 2000e--2(a)(1). The failure to hire is an act of discrimination against which the prospective employee is entitled to relief under the Act. The activities of public employers, therefore, should be subjected to similar constraints under 42 U.S.C. 1983.

Defendants' failure to hire plaintiff, who was amply qualified for the position, for a period of many months while her application was pending, was in violation of the civil rights laws. These facts alone make out a prima facie case, that will take plaintiff past the point of summary judgment. A prima facie case of racially discriminatory denial of employment is made out "by showing (i) that [she] belongs to a racial minority; (ii) that [she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corporation v. Green, 41 U.S.L.W. 4651 (1973).

The Court of Appeals' decision that the present case is not ripe for adjudication, is at odds with the congressional purpose to grant relief for refusing to hire members of minority races, and is inconsistent with

decisions of this Court and other accepted authorities. A suit for an injunction will not be dismissed as prematurely filed, where the occurrence complained of is sufficiently imminent and certain to justify equitable intervention. City Bank Farmers Co. v. Schnader, 291 U.S. 24 (1934). In the present case, from hindsight we learn that a white male was employed in this position three days after the judgment of dismissal, so that plaintiff's apprehensions of existing and continuing racial discrimination are borne out by events. See Mount v. Grand International Brotherhood of Locomotive Engineers, 226 F.2d 604 (6th Cir. 1955), where it was held that the fact that a proposed contract with a railroad alleged to discriminate arbitrarily against certain members of a union had not been executed, did not render premature a suit to enjoin its consummation. The present type of case is analogous to the classical suit for anticipatory breach of contract, where equitable remedies are available. Corbin, Contracts, 946 Sec. 961 (1 Vol. ed. 1952).

Had plaintiff not filed her action when she did, and instead until her application had been pending 14 months and the new permanent Director was hired, she might well have lost her right to an injunction mandating her appointment. Equity aids the vigilant, not those who slumber on their rights. Hammond v. Hopkins, 143 U.S. 224 (1892). If, in

addition to lapse of time, the delay has worked such prejudice to the rights of other persons adversely affected, enforcement of the rights asserted is considered to be inequitable, and relief will be denied. Barnett v. Wells Fargo Nevada National Bank of San Francisco, 270 U.S. 438 (1926). In this context the doctrine of laches would be applied to protect the rights of the newly appointed employee, if he were innocent of any collusion in the discriminatory denial of employment to plaintiff. Galliher v. Cadwell, 145 U.S. 368 (1892). If the position plaintiff sought had been filled at the time the action was commenced, injunctive relief may not have been available, by application of the principle that an injunction is not to afford a remedy for what is past but to prevent future mischief, so that rights already lost and wrongs already perpetrated cannot be corrected by injunction. Swift & Company v. United States, 276 U.S. 311 (1928); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

The District Court suggested, and defendants have contended, that plaintiff has no remedies under the civil rights laws because she "seeks to become defendants' chief executive officer --the person through whom defendants must implement their policies and discharge their own statutory duties." (Infra, p. 30). It is clearly the will of Congress that the civil rights

laws be invoked to bring an end to the denial of administrative, executive, and managerial positions to minority members. The House Report on the 1972 amendment to Title VII, extending coverage to government employees, refers to a need to correct "de facto segregated job ladders," and cites reports by the United States Commission on Civil Rights finding that in several area studies Negros constituted over 70% of the common laborers employed by state and local governments, but that most white collar jobs were largely inaccessible to minority persons. "For example, in Atlanta and Baton Rouge, there were no blacks in city managerial positions." House Report No. 92-238, supra, at 2152. None of the exceptions of public employees from coverage under Title VII fits the position for which plaintiff applied. (The exceptions are for (1) elected officers, (2) members of an elected officer's personal staff, (3) appointees on policy-making levels, who are not at the same time subject to civil service laws, and (4) immediate advisors of elected officers with respect to the exercise of the constitutional or legal powers of the office, who are not at the same time subject to civil service laws. 42 U.S.C. 2000e(f). County directors of social services in North Carolina have no policy-making powers, and are covered by civil service laws. N.C.G.S. 108-19; 108-17(a); and 126-1.)

As was pointed out above, the pro-

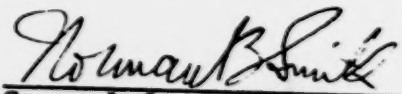
hibitions against discrimination in public employment arising out of 42 U.S.C. 1983, are to be applied consistently with those of Title VII, 42 U.S.C. 2000e. It is clear that administrative and managerial positions in general, and the position of Director of Social Services of Bladen County, are covered by 42 U.S.C. 1983.

It may be that where there is only one position to be filled, and that is an important one, equitable remedies on behalf of a minority applicant ought to be applied somewhat differently than they would in the instance of a semi-skilled position with frequent openings. Nevertheless, the law requires a Negro applicant to one of the preferred positions of employment, which plaintiff sought, be entitled to have the application treated honestly, in good faith, without extraordinary delays, and altogether free from racial prejudice. Plaintiff has been denied these fundamental considerations by the Bladen County Board of Social Services, the District Court, and the Court of Appeals, and for that reason she applies to this Court for a petition for writ of certiorari.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this

petition for writ of certiorari should be granted.



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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 73-1873

DELILAH B. BLANKS

Appellant

v.

WILBUR REGISTER, et al

Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. F. T. Dupree, Jr., District Judge.

Argued December 3, 1973
Decided: March 26, 1974

Before Haynsworth, Chief Judge, and Boreman, Senior Circuit Judge, and Widener, Circuit Judge.

Norman B. Smith (Smith, Carrington, Patterson, Follin & Curtis, on brief) for Appellant; David A. Nash (William L. Hill, II, Hogue, Hill & Jones, on brief) for Appellees.

WIDENER, Circuit Judge:

This civil rights action was brought by Mrs. Delilah Blanks, a Negro female, who sought injunctive relief, including back pay, from the defendant members of the Bladen County, North Carolina Social Services Board. She alleged that the defendants violated 42 USC § 1981, § 1983, and § 2000e-2(a)(1) in failing to appoint her, on account of her race, as Director of Social Services. The defendants filed a verified motion to dismiss under FRCP 12(b)(6) for failure to state a claim, averring, which was not denied, among other things, that Mrs. Blanks was still being considered for the position as Director of Social Services, the position still being vacant at that time.

The district court treated the motion to dismiss as one for summary judgment under FRCP 56, and dismissed the case, holding that the action was premature. Mrs. Blanks complains on appeal that she had no notice the court would treat the motion as one for summary judgment. Because it is clear from the record that the court did indicate its intent to treat the motion as one for summary judgment, and the suit was obviously premature, we affirm.

Mrs. Blanks had been employed by the Bladen County Social Services Board (Board) since 1968, and was granted a one year leave of absence in July, 1971, in order to secure her masters degree in

social services. The director of the Board submitted his resignation to be effective on February 29, 1972. On February 8, 1972, Mrs. Julia Butler, the highest ranking employee in terms of grade and service, was appointed acting director to serve until a permanent director could be appointed. By letter dated February 9, 1972, Mrs. Blanks applied for the position. When this letter was received by the Board the record does not show, so we presume a day or so thereafter. Mrs. Blanks had her job interview with the Board May 22, 1972.

Mrs. Blanks filed this suit on November 14, 1972, at which time a permanent director had not been appointed. The essence of her complaint was that she was a qualified black person and therefore should be appointed. The Board filed its verified answer and motion to dismiss under FRCP 12(b)(6) on December 5, 1972, noting that plaintiff had not been rejected as an applicant and her application was still being considered along with a number of other applicants. This condition remained when Mrs. Blanks filed her unverified response to the motion to dismiss on March 14, 1973. Hearing on defendants' motion was held on April 9, 1973, at which time the court indicated that the FRCP 12(b)(6) motion would be treated as one for summary judgment in accordance with FRCP 56. The memorandum opinion granting summary judgment was issued on

May 11, 1973, as was the order dismissing the case. The Board, until after that date, had not appointed a permanent director, Mrs. Butler's temporary appointment having been extended.

On May 31, 1973, the plaintiff filed her notice of appeal and motion for an injunction pending appeal, which motion was denied by order entered June 1, 1973. For the first time, in the unverified motion for an injunction pending appeal, it was brought to the attention of the district court that, on May 14, 1973, a certain Prince had been appointed as Director of Social Services for the county. In that motion, the plaintiff stated, not supported by affidavit or evidence, that the Board had tentatively agreed to employ Prince sometime during the winter of 1972-73, and that the statement of the Board, in its answer, that the plaintiff was under consideration was "not accurate." Plaintiff, as she could have, made no motion under Rule 59 FRCP to alter or amend the judgment, and no motion under Rule 60 FRCP for relief from the judgment. Rather, she chose to prosecute her appeal on the record submitted to the district court.

Mrs. Blanks now contends that she had insufficient notice of the court's intention to treat the FRCP 12(b)(6) motion as one for summary judgment under Rule 56. We are of opinion the point

is not well taken. As stated before, the court indicated, on April 9th, at the hearing on the motion, its intention to treat the motion as one for summary judgment, and the matter of filing affidavits was discussed at length at that time. The defendants did file an affidavit on April 17, but the plaintiff filed none until August 28, 1973, with her appellate brief in this court, more than three months after the decision of the district court. The "reasonable opportunity to present new material" required by Rule 12(b)(6) is satisfied where the court has made plain its intention to both parties and where one party has acted, and the other not acted, in accordance with the court's request for affidavits outside the pleadings. See Dale v. Hahn, 440 F.2d 633, 638 (2nd Cir. 1971). Cf. Johnson v. R.A.C. Corporation, ___ F.2d ___ No. 73-1958 (4th Cir. 1974), in which case the district court did not indicate to the parties that it was treating the 12(b)(6) motion as one for summary judgment.

The argument on the motion was quite detailed and full opportunity was granted the parties to be heard. 87 pages of transcript are devoted to it. The defendants' position was there stated: "But at this stage nobody has been hired and I don't think you can have a lawsuit. There's no controversy about it."

Following plaintiff's filing of affidavits in this court with her appellate brief, defendants filed affidavits here. Both sets of affidavits deal largely with the merits of the question as to whether or not plaintiff should have received the sought-for appointment. Since none of them were ever seen by the district court, much less considered, we do not consider them here but leave such matters as they may assert for another day. "Our adjudication of the merits of such a challenge will await that time." Socialist Labor Party v. Gilligan, 406 U.S. 583, 589 (1972).

In short, this suit was brought by a plaintiff who applied for a top-level supervisory job, was in fact considered for the position, and then, before the Board had acted in making any appointment, sued, alleging unlawful discrimination because the Board had not appointed her. It is obvious that Mrs. Blanks had not become deprived of any right at the time of the filing of this suit and at the time the case was decided by the district court, because the Board had neither rejected her application nor appointed anyone else to the position. We are of opinion that no justiciable case or controversy under Article III of the Constitution had been presented until the Board had at least done some act or made some omission concerning Mrs. Blanks which affected her in some

way. The case was premature and therefore not ripe for judicial determination. Any opinion a federal court might have given on the merits would have been a forbidden, advisory one.[1]

APPEAL DISMISSED.

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1. Beard v. Stahr, 370 U.S. 41 (1962); Stearns v. Wood, 236 U.S. 75 (1915); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); Eccles v. Peoples Bank, 333 U.S. 426 (1948); A & P Tea Company v. Grosjean, 301 U.S. 412, 429 (1937).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

DELILAH B. BLANKS, Plaintiff,	)	CIVIL NO. 1610
v.	)	MEMORANDUM OF DECISION
WILBUR REGISTER, Chairman of the Bladen County Social Services Board, and GRADY PETERSON, GEORGE RESSEGUIE, MICHAEL R. SIMMONS and CARL SUGGS, Members of the Bladen County Social Services Board, Defendants.	)	

In this civil rights action the plaintiff, a Negro female, seeks injunctive relief including back pay from the defendants, who are the chairman and members of the Bladen County (North Carolina) Social Services Board, upon allegations that the defendants in failing to appoint the plaintiff as Director of Social Services of Bladen County have violated the provisions of 42 U.S.C. §§ 1981, 1983 and 2000e-2(a)(1). The case is before the court on defendants' motion to dismiss for failure of the complaint to state a claim upon

which relief can be granted, the motion being supported by an affidavit in which defendants aver that the position sought by the plaintiff remains unfilled; that plaintiff is being considered along with other applicants for the position; that the defendants did not have in their employment as many as twenty-five persons necessary to make applicable the provisions of 42 U.S.C. § 2000e-2(a)(1) at the time of the alleged discriminatory action of defendants; and that defendants do not use racially discriminatory employment practices as evidenced by the fact that a significant number of defendants' present employees are Negroes. The motion will be treated as one for summary judgment. Rule 12 (b), R.R.C.P.

In addition to her individual claims plaintiff seeks in her complaint to maintain the action as a class action under Rule 23, but on oral argument her counsel has indicated that he would not resist defendants' motion that the action not be allowed to proceed as a class action. Accordingly, it will be considered only on the basis of plaintiff's individual claim.

Plaintiff alleges that she was an employee of the Bladen County Department of Social Services for approximately four years prior to July, 1971, at which time she was granted a year's leave of absence to allow her to secure a master's degree in social work. When

the Director of Social Services of Bladen County resigned as of March 1, 1972, plaintiff promptly applied for the position. She alleges that she is "highly qualified for the job, having attained a State Department of Social Services rating of 80.00 as a 'County Director, Social Services I', and possing a master's degree in social services with a superior academic average together with substantial practical experience."

She further alleges that defendants failed and refused to hire her for the position of Director of Social Services but instead made a temporary appointment of another person as Acting Director and that "the Acting Director does not possess the necessary qualifications, and cannot and will not be appointed as Director".

Plaintiff then alleges that

> "Defendants' refusal to appoint plaintiff as Director of Social Services of Bladen County consists of the failure and refusal to hire an individual, and consists otherwise of discrimination against an individual with respect to her compensation, terms, conditions, and privileges of employment because of the individual's race, color and sex, in violation of 42 U.S.C. 2000e-2(a)(1)."

The relief prayed by plaintiff is "for a permanent injunction against defendants, mandating that they appoint plaintiff to the position of Director of Social Services of Bladen County"; "back pay as Director of Social Services. . . from the date of her application to the date on which injunctive relief is granted"; reasonable attorney's fees; and costs.

Exhaustion of her administrative remedies to the extent required by 42 U.S.C. § 2000e-5(f)(1) is alleged by the plaintiff and denied by defendants. As an academic matter the position of the defendants would appear to be correct. Moreover, while the Civil Rights Act of 1964 was amended by Public Law 92-261, § 2(1), effective March 24, 1972, to include governmental agencies within the term "person", it is undisputed that at the time of the institution of this action the defendants did not have in their employment as many as twenty-five employees necessary to make applicable the provisions of the 1964 Act. Its provisions, therefore, are not available to the plaintiff in this action. At the same time, the plaintiff is not bound by the administrative remedies provisions of the 1964 Act nor its limitations with respect to the number of employees necessary to invoke its provisions. By basing her action also on the Civil Rights Act of 1866, 42 U.S.C. § 1981, plaintiff is entitled

to the identical relief available under the 1964 Act without the burdens of its administrative remedies provisions and other impediments. Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1386 (4th Cir. 1972). Indeed it has been held that a Section 1981 plaintiff may deliberately by-pass the provisions of Title VII of the Civil Rights Act of 1964. Caldwell v. National Brewing Company, 443 F.2d 1044 (5th Cir. 1971); Young v. International Telephone Company, 438 F.2d 757 (3rd Cir. 1971).

But the fact that plaintiff's action has been properly laid under Section 1981 does not insure plaintiff's right to prevail at this time under the facts alleged in her complaint. In demanding that she be appointed as Director of Social Services plaintiff seeks to become defendants' chief executive officer - the person through whom defendants must implement their policies and discharge their own statutory duties. To say that they must appoint the first Negro to apply for the position, although professionally qualified, or risk a suit for damages such as this one strikes the court as a reductio ad absurdum in civil rights litigation.

Defendants have alleged in their answer that

> "The Bladen County Social Services Board has the discretionary

right to select the best available qualified person for the job of Director of Social Services. Plaintiff because she is female and a Negro, and if she meets the minimum requirements of the merit system rules of the State Personnel Board, has no absolute right to public employment as Director of Social Services of Bladen County. For the court to appoint the plaintiff to this position at the plaintiff's request would constitute a gross infringement of federal state relations and separation of powers."

This court agrees. Plaintiff has cited no similar case in which the requested relief has been granted, and the court has found none.

If plaintiff is not entitled to immediate appointment as Director of Social Services, a fortiori she is not entitled to back pay for a position not yet filled. At best plaintiff's action has been prematurely instituted and it must be dismissed. An order will be entered accordingly.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

May 11, 1973.